

# ARIZONA STATE SENATE

## RESEARCH STAFF



TO: MEMBERS OF THE CONSTRUCTION  
LIABILITY APPORTIONMENT STUDY  
COMMITTEE

**MOLLY GRAVER**  
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COMMERCE COMMITTEE  
Telephone: (602) 926 -3171

DATE: January 02, 2019

SUBJECT: Construction Liability Apportionment Study Committee Report

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Attached is the final report of the Construction Liability Apportionment Study Committee required pursuant to Laws 2018, Chapter 336. This report has been distributed to the following individuals:

**Governor of the State of Arizona**

The Honorable Douglas A. Ducey

**President of the Senate**

Senator Steven B. Yarbrough

**Speaker of the House of Representatives**

Representative J.D. Mesnard

**Members of the Construction Liability Apportionment Study Committee**

Senator Karen Fann, Co-Chair

Senator Lupe Contreras

Senator Rick Gray

Representative TJ Shope, Co-Chair

Representative Diego Espinoza

Representative Jill Norgaard

**Secretary of State**

Michelle Reagan

Senate Republican Staff

Senate Democratic Staff

Senate Research Staff

Senate Resource Center

House Republican Staff

House Democratic Staff

House Research Staff

House Chief Clerk

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# **Construction Liability Apportionment Study Committee Report**

## ***Background***

The Construction Liability Apportionment Study Committee (Committee) was established by Laws 2018, Chapter 336. Pursuant to the enacting legislation, the purpose of the Committee was to research and make recommendations for the apportionment of liability in the construction industry, including:

- a) the use of an indemnity provision in construction contracts;
- b) the allocation of liability based on degrees of fault;
- c) the assignment of financial responsibility to negligent parties;
- d) the opportunity to address and remedy alleged construction defects prior to litigation;
- e) the frequency of construction defect litigation; and
- f) the affordability of insurance costs associated with construction claims.

The Committee's membership consisted of the following:

- a) Three members of the Senate, not more than two from the same political party and one appointed as Co-Chair, appointed by the President of the Senate.
- b) Three members of the House of Representatives, not more than two from the same political party and one appointed as Co-Chair, appointed by the Speaker of the House of Representatives.

The Committee was permitted to use the services of legislative staff as required. Committee members were not eligible to receive compensation for committee activities, with the exception of receiving compensation for reimbursement of expenses pursuant to statute. The Committee is to be repealed on July 1, 2019.

The Committee is required to submit a written report to the Speaker of the House of Representatives, the President of the Senate and the Governor, with a copy to the Secretary of State, on or before December 15, 2018.

## ***Committee Activity***

The Committee first met on October 10, 2018. The following presentations were made to the Committee:

- Construction Defect Legislative History- Kevin O'Malley, Gallagher & Kennedy
- Overview of Construction Defect Litigation - Angela Cooner, Lewis Brisbois Bisgaard & Smith LLP

The Committee next met on November 14, 2018. The following presentations were made to the Committee:

- Proportional Liability - Kevin O'Malley, Gallagher & Kennedy and Angela Cooner, Lewis Brisbois Bisgaard & Smith LLP
- Stakeholder Meeting Update - Ryan DeMenna, DeMenna Public Affairs & Spencer Kamps, Home Builders Association of Central Arizona

Finally, the Committee met on December 19, 2018. The following presentations were made to the Committee:

- Final Report Findings and Recommendations – Grant Hanna, Senate Majority Staff Policy Advisor

### ***Recommendations***

The Committee recommended the Legislature consider enacting legislation that does the following:

- Amends the Purchaser Dwelling Act to require subcontractor notice at the onset of a claim for alleged construction defects.
- Requires a subcontractor's insurer to treat a dwelling action notice as a notice of a claim subject to the terms of the subcontractor's insurance policy.
- Requires homeowner notice to provide detail sufficient to identify alleged construction defects, including nature, location and impairment to the home.
- Extends a seller's right to repair to subcontractors and allows a performing subcontractor to repair or replace their own work.
- Establishes proportional liability for homebuilders and residential subcontractors by limiting the scope of permissible indemnity agreements.
- Bifurcates dwelling actions to dismiss claims without merit, release parties without fault and assign any remaining financial responsibility based on relative degrees of fault.
- Increases resolution of homeowner complaints by the Registrar of Contractors in lieu of construction defect litigation.
- Extends the Construction Liability Apportionment Study Committee for one additional year

Please refer to the Appendix for the Committee agendas, minutes and handouts.

## APPENDIX:

- October 10, 2018: agenda, minutes and handout
- November 14, 2018: agenda and minutes
- December 19, 2018: agenda, minutes and handout

# ARIZONA STATE LEGISLATURE

## INTERIM MEETING NOTICE OPEN TO THE PUBLIC

### CONSTRUCTION LIABILITY APPORTIONMENT STUDY COMMITTEE

**Date:** Wednesday, October 10, 2018

**Time:** 10:00 A.M.

**Place:** SHR 1

### AGENDA

1. Call to Order
2. Introduction of Committee Members and Opening Statements
3. Review of Committee Charge
4. Presentations:
  - "Construction Defect Legislative History"- Kevin O'Malley, Gallagher & Kennedy
  - "Overview of Construction Defect Litigation"- Angela Cooner, Lewis Brisbois Bisgaard & Smith LLP
5. Stakeholder Meeting Update - Ryan DeMenna, DeMenna Public Affairs & Spencer Kamps, Home Builders Association of Central Arizona
6. Committee Discussion
7. Future Meeting Date
8. Adjourn

### Members:

Senator Karen Fann, Co-Chair  
Senator Lupe Contreras  
Senator Rick Gray

Representative Thomas R. Shope, Co-Chair  
Representative Diego Espinoza  
Representative Jill Norgaard

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# **ARIZONA STATE LEGISLATURE**

## **CONSTRUCTION LIABILITY APPORTIONMENT STUDY COMMITTEE**

**Minutes of the Meeting**  
**October 10, 2018**  
**10:00 a.m., Senate Hearing Room 1**

### **Members Present:**

Senator Karen Fann, Co-Chair  
Senator Lupe Contreras

Representative Thomas R. Shope, Co-Chair  
Representative Diego Espinoza

### **Members Excused:**

Senator Rick Gray

Representative Jill Norgaard

### **Staff:**

Grant Hanna, Senate Research Staff  
Jon Rudolph, House Research Staff

Co-chair Fann called the meeting to order at 10:06 a.m. and attendance was noted.

## **INTRODUCTION OF COMMITTEE MEMBERS AND OPENING STATEMENTS**

Senator Fann gave opening remarks and requested the members to introduce themselves.

## **REVIEW OF COMMITTEE CHARGE**

**Grant Hanna, Commerce and Public Safety Committee Analyst**, distributed and explained a PowerPoint presentation entitled "C.L.A.S.C." (Attachment A).

## **PRESENTATIONS**

### **"Construction Defect Legislative History"- Kevin O'Malley, Gallagher & Kennedy**

Senator Fann offered comments.

**Kevin O'Malley, Home Builders Association**, gave an overview of the past and present situation regarding liability in the construction industry and answered questions posed by the Committee.

**"Overview of Construction Defect Litigation"- Angela Cooner, Lewis Brisbois Bisgaard & Smith LLP**

**Angela Cooner, Arizona Subcontractors Association, American Subcontractors Association of Arizona, Arizonans for Fair Contracting**, gave an overview of the situation regarding construction defect litigation, the driving forces and the consequences. Ms. Cooner answered questions posed by the Committee.

**STAKEHOLDER MEETING UPDATE - RYAN DEMENNA, DEMENNA PUBLIC AFFAIRS & SPENCER KAMPS, HOME BUILDERS ASSOCIATION OF CENTRAL ARIZONA**

**Ryan DeMenna, DeMenna Public Affairs, Arizonans for Fair Contracting**, thanked everyone who has been involved in the working group and stakeholder process. Mr. DeMenna gave an overview of Arizonans for Fair Contracting and read an excerpt from the Introduced Version of SB 1271 (2018) (Attachment B). Mr. DeMenna outlined the work that is being done and the research for best practices.

**Spencer Kamps, Home Builders Association of Central Arizona**, spoke of the progress being made, shared goals, mass lawsuits and how complicated the situation is.

**COMMITTEE DISCUSSION**

The Committee discussed the situation, work being done and points to prioritize.

**FUTURE MEETING DATE**

Mr. DeMenna explained the working group timeline and possible times for the next meetings.

Mr. Hanna explained deadlines, meeting topics and that dates during the first week of November are unavailable.

Senator Fann suggested November 13<sup>th</sup>, 14<sup>th</sup> or 15<sup>th</sup> for the next meeting. The other members of the Committee stated they were currently available for those dates. Senator Fann requested for Mr. Hanna to send out an email to all parties involved to coordinate a date.

There being no further business, the meeting was adjourned at 11:25 a.m.

Respectfully submitted,

Shelley Ponce  
Committee Secretary

(Audio recordings and attachments are on file in the Secretary of the Senate's Office/Resource Center, Room 115. Audio archives are available at <http://www.azleg.gov>)



# C.L.A.S.C.

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October 10, 2018

## COMMITTEE CHARGE

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S. B. 1271 (construction liability; apportionment; study)

Research and make recommendations for the apportionment of liability in the construction industry, including:

1. The use of an indemnity provision in construction contracts.
2. The allocation of liability based on degrees of fault.
3. The assignment of financial responsibility to negligent parties.
4. The opportunity to address and remedy alleged construction defects prior to litigation.
5. The frequency of construction defect litigation.
6. The affordability of insurance costs associated with construction claims.

# INDEMNITY CLAUSE

In Construction Contracts

- Contractual provision in which one party agrees to answer for any liability or harm that the other party might incur (*Black's Law Dictionary*)
- Public Buildings or Improvements ([A.R.S. § 41-2586](#))
  - Prohibited: Clause in contract or subcontract that purports to indemnify, to hold harmless, or to defend the contractor of, from or against liability for loss caused by its own negligence
  - Permitted: Contractor may indemnify itself from liabilities, damages and attorney's fees resulting from the negligence, recklessness or intentional wrongful conduct of the performing subcontractor or design professional

# PURCHASER DWELLING ACTIONS

Residential purchaser may file action for any dwelling **construction defect** ([A.R.S. § 12-1361](#))

- Construction Defect - a **material deficiency** in the design, construction, manufacture, repair, alteration, remodeling or landscaping of a dwelling caused by:
  - a violation of construction codes
  - the use of defective materials
  - failure to adhere to generally accepted workmanship standards
- Material Deficiency – a deficiency that actually impairs the structural integrity, the functionality or the appearance of the dwelling at the time of the claim, or is reasonably likely to impair in the foreseeable future if not repaired or replaced

## FILING PROCESS

In Dwelling Actions ([A.R.S. § 12-1362](#) & [1363](#))

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- **Notice**

- Before filing, the purchaser must provide written notice to seller specifying in reasonable detail the basis for the dwelling action (except for claims involving immediate life/safety threat)
- Seller's insurer must treat notice as a claim under insurance policy

- **Inspection**

- Seller may inspect dwelling to determine nature and cause of alleged construction defects and the extent of any repairs or replacements necessary to remedy


- **Response**

- Seller provides written response that may include notice of intent to **repair or replace** any alleged defects
- 

## REPAIRS OR REPLACEMENTS

Added by [Laws 2015, Ch. 60 § 5](#)

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- Seller response describes in reasonable detail all intended repairs/replacements
  - Time frames
    - Start – Make reasonable efforts to begin repairs within 35 days of seller response
    - End - Completed within a commercially reasonable time frame
  - Performance
    - Purchaser may request a new construction professional that was not involved in the original dwelling design/build
- 

# REPORT OF FINDINGS & RECOMMENDATIONS

Due December 15, 2018

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Research and make recommendations for the apportionment of liability in the construction industry, including:

1. The use of an indemnity provision in construction contracts.
2. The allocation of liability based on degrees of fault.
3. The assignment of financial responsibility to negligent parties.
4. The opportunity to address and remedy alleged construction defects prior to litigation.
5. The frequency of construction defect litigation.
6. The affordability of insurance costs associated with construction claims.

# ARIZONA STATE LEGISLATURE

## INTERIM MEETING NOTICE OPEN TO THE PUBLIC

### CONSTRUCTION LIABILITY APPORTIONMENT STUDY COMMITTEE

**Date:** Wednesday, November 14, 2018

**Time:** 10:00 A.M.

**Place:** SHR 1

### AGENDA

1. Call to Order
2. Proportional Liability - Kevin O'Malley, Gallagher & Kennedy & Angela Cooner, Lewis Brisbois Bisgaard & Smith LLP
3. Stakeholder Meeting Update - Ryan DeMenna, DeMenna Public Affairs & Spencer Kamps, Home Builders Association of Central Arizona
4. Committee Discussion
5. Future Meeting Date
6. Adjourn

### Members:

Senator Karen Fann, Co-Chair  
Senator Lupe Contreras  
Senator Rick Gray

Representative Thomas R. Shope, Co-Chair  
Representative Diego Espinoza  
Representative Jill Norgaard

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# ARIZONA STATE LEGISLATURE

## CONSTRUCTION LIABILITY APPORTIONMENT STUDY COMMITTEE

Minutes of the Meeting  
November 14, 2018  
10:00 a.m., Senate Hearing Room 1

### Members Present:

Senator Karen Fann, Co-Chair  
Senator Rick Gray

Representative Diego Espinoza

### Members Excused:

Senator Lupe Contreras

Representative Thomas R. Shope, Co-Chair  
Representative Jill Norgaard

### Staff:

Grant Hanna, Senate Research Staff  
Jon Rudolph, House Research Staff

Co-chair Fann called the meeting to order at 10:09 a.m. and attendance was taken.

Senator Fann stated that today's meeting will be a discussion only, no official action will be taken until a subsequent meeting.

### **Proportional Liability - Kevin O'Malley, Gallagher & Kennedy & Angela Cooner, Lewis Brisbois Bisgaard & Smith LLP**

**Kevin O'Malley, Homebuilders Association of Central Arizona**, gave an overview of the progress that has been made since the last meeting regarding getting homeowners problems fixed while reducing the litigation burden. Mr. O'Malley stated some parts of the current system work, but steps are necessary to address other issues. Mr. O'Malley answered questions posed by the Committee.

**Angela Cooner, Arizonans for Fair Contracting**, spoke of the process that has been undertaken to address the purpose of the study committee and the progress that has been made. Ms. Cooner spoke on bringing language forward to take the next step towards addressing construction liability apportionment. Ms. Cooner answered questions posed by the Committee.

Mr. O'Malley answered additional questions posed by the Committee.

**Spencer Kamps, Home Builders Association of Central Arizona**, testified regarding active clauses and indemnity clauses. Mr. Kamps expressed the need to get draft wording

out so that all parties will have an opportunity to provide input. Mr. Kamps answered questions posed by the Committee.

**Stakeholder Meeting Update - Ryan DeMenna, DeMenna Public Affairs & Spencer Kamps, Home Builders Association of Central Arizona**

Mr. Kamps deferred some of his time to James Holland to speak regarding a situation he has been involved in that gives an example of the situation the committee is addressing.

**James Holland, Stinson, Leonard & Street**, explained a situation his law firm has been working with regarding homeowners and building defects. Mr. Holland answered questions posed by the Committee.

**Ryan DeMenna, DeMenna Public Affairs, Arizonans for Fair Contracting**, thanked everyone who has been involved in the stakeholder process and the need to bring draft legislation language to the larger group for vetting. Mr. DeMenna emphasized the focus being on the homeowner and making them whole.

**Committee Discussion**

The Committee discussed the process, draft language and informing the State Bar Association of the problems that have been found.

**Future Meeting Date**

Senator Fann talked about holding a stakeholder meeting in approximately three weeks and a committee meeting near December 15<sup>th</sup> which is the report date.

There being no further business, the meeting was adjourned at 11:01 a.m.

Respectfully submitted,

Shelley Ponce  
Committee Secretary

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# ARIZONA STATE LEGISLATURE

## INTERIM MEETING NOTICE OPEN TO THE PUBLIC

### CONSTRUCTION LIABILITY APPORTIONMENT STUDY COMMITTEE

**Date:** Wednesday, December 19, 2018

**Time:** 9:00 A.M.

**Place:** SHR 1

### AGENDA

1. Call to Order
2. Roll Call
3. Approval of Minutes
4. Overview of Study Committee Findings
5. Public Testimony
6. Comments and Committee Recommendations
7. Adjourn

### Members:

Senator Karen Fann, Co-Chair  
Senator Lupe Contreras  
Senator Rick Gray

Representative Thomas R. Shope, Co-Chair  
Representative Diego Espinoza  
Representative Jill Norgaard

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# ARIZONA STATE LEGISLATURE

## CONSTRUCTION LIABILITY APPORTIONMENT STUDY COMMITTEE

**Minutes of the Meeting**  
**December 19, 2018**  
**9:00 a.m., Senate Hearing Room 1**

### **Members Present:**

Senator Karen Fann, Co-Chair  
Senator Rick Gray

Representative Thomas R. Shope, Co-Chair  
Representative Jill Norgaard

### **Members Excused:**

Senator Lupe Contreras

Representative Diego Espinoza

### **Staff:**

Grant Hanna, Senate Staff  
Molly Graver, Senate Research Staff  
Jon Rudolph, House Research Staff

Co-Chair Fann called the meeting to order at 9:06 a.m. and attendance was taken.

### **APPROVAL OF MINUTES**

**Senator Fann requested a motion for the approval of the minutes, Representative Shope stated "so moved", Representative Norgaard seconded the motion. The motion carried by voice vote.**

### **Overview of Study Committee Findings**

**Grant Hanna, Senate Staff**, explained a PowerPoint presentation regarding the recommendations that have been agreed upon by the stakeholders (Attachment A).

### **Public Testimony**

**Kevin DeMenna, DeMenna Public Affairs, Arizonans for Fair Contracting**, testified in support of the recommendations as explained by staff.

**Spencer Kamps, Homebuilders Association of Central Arizona**, testified in support of the recommendations and spoke regarding topics still unresolved. Mr. Kamps answered questions posed by the Committee.

## **Comments and Committee Recommendations**

**Representative Shope moved that the Study Committee recommend to the full Legislature the adoption of legislation that does the following:**

- 1. Amends the Purchaser Dwelling Act to require subcontractor notice at the onset of a claim for alleged construction defects.**
- 2. Requires a subcontractor's insurer to treat a dwelling action notice as a notice of a claim subject to the terms of the subcontractor's insurance policy.**
- 3. Requires homeowner notice to provide detail sufficient to identify alleged construction defects, including nature, location and impairment to the home.**
- 4. Extends a seller's right to repair to subcontractors and allows a performing subcontractor to repair or replace their own work.**
- 5. Establishes proportional liability for homebuilders and residential subcontractors by limiting the scope of permissible indemnity agreements.**
- 6. Bifurcates dwelling actions to dismiss claims without merit, release parties without fault and assign any remaining financial responsibility based on relative degrees of fault.**
- 7. Increases resolution of homeowner complaints by the Registrar of Contractors in lieu of construction defect litigation.**
- 8. Extends the Construction Liability Apportionment Study Committee for one additional year.**

**Senator Gray seconded the motion. The motion CARRIED by voice vote.**

Attached are the forms noting the individuals who submitted a Speaker slip on the agenda items (Attachment B).

There being no further business, the meeting was adjourned at 9:30 a.m.

Respectfully submitted,

Shelley Ponce  
Committee Secretary

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# CLASC Final Report

Findings and Recommendations

December 19, 2018

## Final Report

- Committee Charge
  - Make recommendations for the apportionment of liability in the construction industry
  - Submit report to the Governor, Senate President & House Speaker
- Proposed Recommendations
  - Notice & Insurance
  - Right to Repair
  - Proportional Liability

## Notice & Insurance

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- Subcontractor notice at the beginning of a claim
- Sufficient detail in homeowner notice to identify alleged construction defects
- Subcontractor's insurance policy triggered at notice of dwelling action

## Right to Repair

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- Subcontractor right to repair
- Allow performing subcontractor to fix own work
- Increased resolution of homeowner complaints by the Registrar of Contractors

## Proportional Liability

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- Bifurcate dwelling actions
  - Phase 1: dismiss claims without merit and release parties without responsibility or fault
  - Phase 2: assign remaining financial responsibility based on relative degrees of fault
- Limit the scope of permissible indemnity agreements

## Final Report Recommendations

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- Notice to subcontractors at the beginning of a claim
- Sufficient detail in homeowner notice to identify alleged construction defects
- Subcontractor's insurance policy triggered at notice of dwelling action
- Subcontractor right to repair and opportunity to fix own work
- Increased resolution of homeowner complaints by the Registrar of Contractors
- Proportional Liability
  - Limit scope of permissible indemnity agreements
  - Bifurcate dwelling action to assign liability based on fault
- Construction Liability Apportionment Study Committee extension